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Supreme Court of the United States.

OCTOBER TERM 1929, NO. 36.

(October Term 1928, No. 687.)

THE CORN EXCHANGE BANK,

Appellant,

—against—

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Appellee.

BRIEF OF APPELLANT.

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—against—

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Appellee.

BRIEF OF APPELLANT.

I.

The opinions of the Courts below.

The opinion of the Court of Appeals of the State of New York is reported in *Coler* v. *Corn Exchange Bank*, 250 N. Y. 136 (and is printed at p. 47 of the Transcript of Record), and the opinions and the dissenting opinion of the intermediate Court, to wit, the Appellate Term of the Supreme Court of the State of New York, are reported in *Coler* v. *Corn Exchange Bank*, 132 Misc. Rep. (N. Y.) 449 (and are printed at pp. 39 and 45 of the Transcript).

II.

Jurisdiction.

Appellant has complied with paragraph 1 of Rule 12 of the Rules of the Supreme Court by filing a printed statement as to the jurisdiction on appeal, and this Court has announced the finding "that probable jurisdiction has been shown".

III.

Statement of the case.

This is an appeal to this Court from an order and judgment made and entered in this cause by the Court of Appeals of the State of New York on the 31st day of December, 1928 (R., p. 56), which judgment affirmed a judgment of the City Court of the City of New York, New York County (R., p. 1). The said judgment of the City Court was entered pursuant to an order of the Appellate Term of the Supreme Court of the State of New York (an intermediate court of appeal) (R., pp. 6 to 8 inclusive), which said order of the Appellate Term of the Supreme Court reversed a prior judgment of the City Court dismissing the complaint and directed judgment in favor of the plaintiff for the amount claimed (R., p. 33). The original judgment of the City Court dismissing the complaint (R., p. 13) was entered upon motion of the appellant, notice of motion therefor being found at page 20 of the record (R., p. 20).

The action was brought in the City Court of the City of New York, New York County, a court of original

jurisdiction, by the plaintiff, the appellee here, in his capacity as Commissioner of Public Welfare of the City of New York under Sections 921-925 of the Code of Criminal Procedure of the State of New York. Title VIII, entitled "Of Proceeding respecting the Support of Poor Persons" (see Complaint, R., pp. 16-17). Title VIII forms part of Part VI of the Code of Criminal Procedure of the State of New York and Part VI is entitled "Of Special Proceedings of a Criminal Nature". These sections are set forth in full in Appendix A of this brief at pages 49-52 thereof.

The complaint alleges the deposit by one De Stefano with appellant bank; that De Stefano was the husband of one Mary De Stefano; that there is an infant child, the issue of said marriage; that De Stefano abandoned his said wife and child and absconded from the State of New York (R., p. 16). The complaint further alleges the obtaining of a warrant of two City Magistrates under sections of the Code of Criminal Procedure above referred to "directing the said Bird S. Coler, Commissioner of Public Welfare of the City of New York, to take and seize all the right, title and interest of the said Raffaele De Stefano in and to the sum of Two thousand and thirty ($2,030) Dollars which is now in the possession of the defendant", and to make return to the Court of General Sessions of the County of New York (R., pp. 16, 17). The complaint then alleges the service of said warrant upon the appellant and the refusal of the appellant to deliver to the Commissioner of Public Welfare the sum of money referred to in said warrant. The complaint then asks judgment for said amount against the appellant (R., p. 17). *The complaint nowhere alleges any notice of the proceeding had been given to said de-*

positor and it is not even alleged that the matrimonial domicile is in the State of New York (R., pp. 41-45).

The appellant, under the New York practice, without answering the complaint and before its time to answer had expired, made a motion to dismiss the complaint upon various grounds, principally upon the ground that the complaint failed to state facts sufficient to constitute a cause of action, in that the sections of the Code of Criminal Procedure under which the Commissioner of Public Welfare sought to act were unconstitutional under the Constitution of the United States, particularly the Fourteenth Amendment thereto, in that they attempted to deprive persons, including the appellant and its depositor, De Stefano, of property without due process of law (R., pp. 20, 21). The practice herein referred to is substantially the same as what is generally known as a demurrer, demurrers as such having been abolished in the State of New York and motions, such as appellant made, having been substituted therefor with like effect. The judgment appealed from is therefore similar to the overruling of a demurrer and to the entering of judgment forthwith without leave to answer. Consequently there has been no trial of any issues of fact.

(It may be confusing to this Court to note that from pages 9 to 33 inclusive of the record is entitled "Remittitur from Appellate Term to the City Court of the City of New York". This is due to a rather peculiar statutory and constitutional provision of the State of New York which permits an appeal from the judgment of the City Court entered upon the remittitur of the Appellate Term direct to the Court of Appeals of the State of New York, rather than from the order and judgment of the Appellate Term of the Supreme Court of the State of New York itself.)

IV.

Specifications of error.

(1) The Court of Appeals of the State of New York by its affirmance of the judgment of the City Court of the City of New York entered pursuant to an order of reversal of the Appellate Term of the Supreme Court of the State of New York, First Department, which said judgment denied the appellant's motion to dismiss the complaint and granted judgment for the appellee, erred in holding that Sections 921-922 of the Code of Criminal Procedure of the State of New York were not violative of the provisions of the Constitution of the United States, particularly the Fourteenth Amendment thereto, and said Court further erred in that it did not dismiss the complaint on the ground that said complaint fails to state facts sufficient to constitute a cause of action by reason of the fact that any right of action is based upon Sections 921 and 922 of the Code of Criminal Procedure of the State of New York, referred to in the complaint, and that said sections are unconstitutional under the Constitution of the United States, and particularly the Fourteenth Amendment thereto, in that said sections by their terms, and as construed by the Court of Appeals, attempt to deprive persons, including the appellant, The Corn Exchange Bank, and its depositor, Raffaele De Stefano, mentioned in said complaint, and either or both of them, of property without due process of law.

(2) The said Court of Appeals further erred in said affirmance of the denial of the appellant's motion, as aforesaid, in that it did not dismiss the complaint on the

ground that the plaintiff in said action, the appellee herein, has no legal capacity to sue and has no title or interest in the fund referred to in the complaint, and the court in which said action was instituted has no jurisdiction of the subject of the action, because the plaintiff, the appellee herein, derived whatever capacity or interest he has or had from Sections 921 and 922 of the Code of Criminal Procedure of the State of New York, which said sections, as heretofore stated, are unconstitutional and in violation of the Fourteenth Amendment of the Constitution of the United States, in that said sections attempt to deprive said appellant, The Corn Exchange Bank, and its depositor, Raffaele De Stefano, and either or both of them, of property without due process of law.

V.

Argument.

As set forth in our statement of facts, Sections 921-925 of the Code of Criminal Procedure form part of Title VIII of that Code, and Title VIII forms part of Part VI of said Code, Part VI being entitled "Of Special Proceedings of a Criminal Nature", and are set forth in Appendix A annexed to this brief, at pages 49-52 thereof.

It will readily be noted that *the Legislature in enacting these statutes utterly neglected to provide therein for notice of any kind, either in the Magistrate's Court or at any later stage of the proceedings, to be given to the alleged absconded husband, the appellant's depositor.* The entire proceeding from its inception to its conclusion, is *wholly ex parte,* and this, though the statute provides not merely for the seizure of property, but for the vest-

ing of title thereto in a third party, as completely and fully as if the owner of the fund had made a legal and voluntary transfer of the fund and all his interest therein.

The question involved on this appeal is whether said statute is constitutional, which requires a bank to pay money it owes a depositor to the Commissioner of Public Welfare, by reason of the statute which purports to create an assignment of the fund, although the statute provides for *no notice whatever either to the depositor or to the bank.*

The Court of Appeals, in affirming the constitutionality of the statute, unblushingly recognizes that by reason of the lack of notice the depositor may at any time attack the *ex parte* proceeding which established the assignment (R., pp. 52-53), and so it is evident that upon showing that he was not an absconding husband or father or one whose matrimonial domicile was not in the State of New York, or that his wife and child were not likely to become public charges, could recover from the bank the amount of the deposit, even though the bank has complied with the order of the Magistrate's Court and paid same over to the Commissioner of Public Welfare.

Thus the appellant bank, under the statute in question and under the decision of the Court of Appeals of New York State, may have to pay a debt twice, although throughout it has been an entirely innocent party in the matter.

This incongruous result is possible under the statute in question, which provides that when a complaint is made by the Commissioner of Public Welfare, that a husband has absconded and left his wife and child unprovided for, on an *ex parte* proceeding instigated for

such purpose and *without any notice whatsoever to the alleged absconder,* and upon *ex parte* proof of such facts having been made, the Magistrates of the Court are required to issue an order directing the Commissioner of Public Welfare to take and seize property of the alleged absconder and make an inventory thereof and return same to the next County Court of the county where the seizing officers reside.

As stated, *the statute requires no notice whatsoever, either by publication or otherwise, to be given to the alleged absconding husband and father* either before issuance of the process directing the bank to turn over the money on deposit to the Commissioner of Public Welfare, or even thereafter when the Court confirms or discharges the warrant and seizure and determines what part of the property shall be applied towards the maintenance of the children or spouse of the alleged absconder.

Thus, on an *ex parte* application to which neither the bank nor the alleged absconding husband is a party, and to neither of whom notice is given, an order finding the statutory facts may be made and the bank, under the decision of the Court of Appeals, is compelled to make the payment, even though it may subsequently have to pay a second time if it should develop that the husband had not in fact absconded or that the dependents of the absconder were not chargeable or likely to become chargeable upon the public. The theory of the law as construed by the Court of Appeals is that there is a statutory assignment of the fund to the Commissioner of Public Welfare (see R., p. 51).

It is the contention of the appellant that before it can be compelled to pay to one person a debt it owes to another person, on the theory of statutory assignment, there must first be a determination by a judicial proceeding, upon notice to the debtor of the bank, that the

facts on which such assignment depend actually exist and that the money is due such other person, in which case the bank can safely make the payment without any danger of any comeback from the person to whom the payment is directed to be made. But this was not done in the case at bar and is not even contemplated, much less provided, in the statute in question.

As we will show hereafter, the law is well settled that a statute taking an owner's property is unconstitutional which fails to provide for notice to the party whose property is to be taken. This is so, even though in fact the person might have notice of the proceeding (see cases *infra,* Point C). The appellant's position is that before it can be compelled to pay to one person money it owes to another person the constitutional requirements must be complied with, and that the party must show that the statute requires notice, and that notice was in fact given.

The theory on which the Court of Appeals has proceeded is that the bank, which is manifestly in no position to ascertain the facts, and which has been given no notice of the *ex parte* hearing, cannot object to payment but must at its peril be prepared to set up a defense that the depositor was not in fact an absconding husband, or else it is bound by the *ex parte* findings.

That the Court of Appeals recognizes that the *ex parte* proceeding is not binding upon the alleged absconding husband, and that the bank may have to make payment twice, is clearly shown by the following extracts from the opinion:

> "In holding that the act is valid as a regulation by the Legislature of the family relation, *we assume that the owner,* the victim of the seizure,

is in truth a husband or a parent, his matrimonial domicile here and not abroad. Jurisdiction is, of course, dependent upon the existence of the relation which the statute seeks to regulate. In the absence of that relation, the warrant and any proceedings under it may be disregarded, as a nullity (*Thompson* v. *Whitman*, 18 Wall. 457). We do not read the statute as prescribing anything to the contrary. If it were open to a different reading, it would be void to that extent. *The owner may come forward at any time and reclaim the fund from any one on the ground that in truth he was neither spouse nor parent, though charged as such in the petition.* Neither the provisional warrant of the magistrates nor the confirmatory judgment later will then be evidence against him. *Not improbably he may come forward at any time and contest the charge that he absconded,* though admitting parenthood and marriage. * * * *This case does not require us to hold, however, that he will even then be bound unless in truth he has absconded.* * * *

The case in brief is this: the statute, though it dispenses with notice, is valid and effective as against an absconding spouse or parent. *The victim of the seizure may nullify the whole proceeding, including any adjudication attempted in his absence, if there is lacking the jurisdictional relation which is the basis of his duty."*

It is indeed a strange anomaly that a proceeding against an alleged absconder's debtor should bind the debtor but not the absconder. That the statute does in fact do what we claim it does is conceded by the Court of Appeals, and that Court concedes that no notice is provided for at any stage of the proceedings (R., p. 54),

unless the mere seizure itself constitutes notice, which we will hereinafter show has been repudiated by this Court in the very case cited as an authority therefor by the Court of Appeals.

We need not therefore argue the construction of the statute as the highest court of the State has agreed with us in that respect.

Throughout the opinion the Court of Appeals considers the question solely and only from the standpoint of the alleged absconder, and *entirely overlooks the fact that what is seized is the property of the appellant bank and not of the absconder.* It is true that the bank owes a debt to the depositor, but that fact does not any the less make the seizure a seizure of the property of the bank, and the bank is entitled to have its property protected from seizure even though it owes a debt to another person, except in a case where legal title to the debt has been transferred to another by such a legal act, as cannot be attacked by the depositor.

To justify the seizure, therefore, upon the theory of statutory assignment, the complaint is not sufficient in that it does not allege all the facts necessary to show unquestioned title in the Commissioner of Public Welfare, for this it fails to do when the statute under which the proceeding is authorized admittedly provides for no notice to either the debtor or even the appellant bank, and no notice is alleged in the complaint. Moreover, the Court of Appeals itself admits repeatedly in its opinion that the depositor is not bound by the judgment because of the lack of notice.

The theory of the Court of Appeals is that the appellate bank is defending in the right of the depositor, and that it can have no defenses which are not open to its depositor, and that the depositor would be bound even

though he had no notice, unless he was able to show that he was not an absconding husband, and consequently the appellant bank must at its peril assume the burden of proving that the depositor had not absconded in order to avoid making payment to the Commissioner of Public Welfare.

That is just where the error comes in as we understand it, for *the appellant bank is not defending in the right of its depositor. It is defending its own property in its own right*, and it claims that it may not be compelled to pay a debt, due to its depositor, to another person on the theory that that other person has a statutory assignment thereof, unless and until that person alleges facts which conclusively show such statutory assignment and that that is not done in the case at bar where admittedly the person whose property is claimed to have been assigned has had no notice of the proceeding which it is claimed created the assignment, and so concededly might successfully attack same.

To sustain the constitutionality of the statute in question will open the door to the grossest sort of fraud. No bank will be safe. Any irate or misinformed wife or child may have a husband's or father's bank account seized when he may be sojourning at a distance, and then have the money used for their support, and upon the husband's or father's returning after a long period of time and finding out about the matter, and showing that he did not abscond or that he was not in fact the husband or father as alleged, or that the matrimonial domicile was not in New York State, the bank will have to pay him and will of course be unable to recover from the wife or child for whose support the money has been used.

The question is a real one, and of the utmost import-

ance to banks, and is in no sense a mere techincal question.

The Court of Appeals seems to have been actuated to some extent in deciding as it did by the theory that the law is a very old one and has apparently never been questioned. In this respect we respectfully call attention to the fact that until 1829 (see Opinion, Court of Appeals, R., pp. 49-50), the law admittedly did not cover choses in action such as a debt. Moreover the Fourteenth Amendment to the United States Constitution, under which the appellant bank claims, was not enacted until 1866. Its antiquity is, therefore, nothing like what the Court of Appeals claims for it. The statute has apparently not been resorted to until lately to any extent. The antiquity of the statute is of no importance except in case of ambiguity, when it may be considered in determining the proper construction of the statute. Where the language of the statute is clear and precise, and the meaning evident, the statute will be declared unconstitutional no matter how long it has been in existence.

In an endeavor to uphold its contention the Court of Appeals tries to work out a theory of notice by claiming that the statute creates a sort of community property imposed by the marriage relationship of which every married person has notice, and that this complies with the constitutional requirement. But it must be borne in mind that even admitting all the allegations in the complaint, it has nowhere been shown that the marriage contract was entered into in the State of New York, or that a matrimonial domicile was ever validly established in the State of New York, or that the alleged husband did not in fact adequately provide for his alleged wife, because no such allegations are contained in the complaint. And except for the technical admission by appel-

lant's motion of the allegations contained in the complaint, it has nowhere been shown that the alleged husband ever was in fact a husband, or that he ever absconded from the State of New York.

But if the Court of Appeals considers this relationship notice then why should the Court of Appeals admit as it does throughout its opinion that the proceeding can be attacked by the alleged absconder. *If he had notice he would have had his day in court and would not be heard afterwards to allege any defense which he failed to allege at that time. It is apparent, therefore, that the court really recognizes that there is no really sufficient notice provided for.* Otherwise it would not be consistent to admit that the judgment of seizure could ever be attacked by the alleged absconding husband.

We also call special attention to the fact that the statement made in the opinion of the Court of Appeals that "here we have neither proof nor claim that the jurisdictional relation * * * was lacking at the time of seizure" (R., p. 52) is erroneous. We do claim, and at all times have claimed, that the jurisdictional elements were lacking and could not be shown without giving to the depositor notice and an opportunity to be heard thereon at some stage of the proceeding at least. A clear distinction of course must be made between statements of fact in the complaint and the statements of what was shown by proof in the proceeding in the Magistrate's Court, as alleged in paragraph numbered "Fifth" of the complaint (R., pp. 16, 17). An admission that certain facts were duly (according to the requirements of the statute in question) proved in the *ex parte* proceeding in that court does not of course admit the facts themselves.

The Court of Appeals in comparing this statute as

stated above to that of a statute creating community property of a husband and wife, which is the law of some states having as a basis the Civil Law, but which is not the law of the State of New York, entirely overlooks the theory that such a property right as community property of husband and wife is vastly different to that intended to be conferred by this statute. The theory of the community property is that the contract of marriage itself establishes a partnership ownership of the property of each, acquired after marriage, in the husband and wife jointly as part of the community (C. J., Vol. 31, p. 18, Sec. 1089), in somewhat the same way that at common law the wife's personal property becomes vested in the husband. But the statute in question in the case at bar does not create or intend a *vesting* of property in one spouse at the inception of the marriage contract, but rather seeks to enforce a contract right or duty of a husband to support his wife. That is not a property right. It is a contract right or duty. It is a personal right of the wife against the husband, not a property right of herself or a partnership of property, which formerly belonged to him. Without the aid of the statutory proceeding in question could she bring an action for conversion of her alleged husband's property? Could she convey it to another? Would an indictment be good which alleged a theft from her? Clearly not. It is not her property, and does not become so until confiscated by the State and conveyed by the State to her. But may the State do this without due process of law? That is the question here presented.

The true analogy is, therefore, not that of community property but that of matrimonial actions, and ample protection is afforded to wives and minor children in New York, as in all states, by different forms of matrimonial

actions. The same situation which this statute seeks to take cognizance of is a proper subject for a matrimonial action. If a husband does not support his wife or absconds from her, she may sue him for separation and attach his property for that purpose, but such an action differs in no respect from any other action, in which jurisdiction is conferred by some form of reasonable notice and an opportunity to be heard.

We feel that the Court of Appeals was influenced through a misplaced sympathy for a wife alleged to be starving. If a wife is in fact starving, if her alleged husband is in fact a husband, if he is in fact under a duty to support her, if he has in fact failed in such duty, and if he has money available for such purpose, he should be compelled to use it for the relief of his wife. With all this we agree. But should *anyone's* property be used for such alleged purpose, much less his debtor's property, without affording such a person the opportunity to deny the alleged relationship and the charges against him? Where is the governmental necessity for not affording such a person reasonable notice and an opportunity to be heard? If the need for relief of the alleged wife is urgent the State can afford to advance to the wife sufficient support, pending notice to the alleged husband and an opportunity to him to be heard, in the same manner that the State can and does advance moneys for the support of indigent persons who have no one legally bound to support them. The notice can be by publication and can be quite short, as reasonable notice is all that is required.

The Court of Appeals also states that the victim, the alleged husband, may if the jurisdictional facts are untrue, nullify the proceeding when he learns of the facts. That right is of no value to him, and much less to his

debtor, if the money has been spent, and since the entire proceeding is intended to afford the alleged wife immediate relief the money will unquestionably *be* spent. The Court of Appeals says (R., p. 54):

> "De Stefano will be unaffected by any adjudication made at any stage of these proceedings if the jurisdictional relation, the postulate behind the seizure, is found to be unreal."

But that learned Court adroitly overlooked the fact that no opportunity is afforded him to contest the relation until after the money is irretrievably gone. There is a vast difference between seizure without preliminary notice when it is to be followed by notice and a hearing before the property seized is administered, and the case at bar, where not only is the seizure without notice but the subsequent hearing, so-called, and the complete administration of the property is all to be had without notice to the owner, and the property taken is that of a debtor of the husband.

POINT A.

Though actual notice of the proceeding in the absence of a requirement therefor in the statute would not prevent the proceeding from being unconstitutional under the Fourteenth Amendment to the United States Constitution as a taking of property without due process of law, as we show hereinafter in Point C, nevertheless it appears in the case at bar that *no notice whatsoever was in fact had* by the depositor or the appellant bank.

While authorities hereinafter cited under Point C, conclusively show that, where a statute itself fails to contain provision for notice it matters not that the parties interested may in fact have had notice, the statute is nevertheless unconstitutional, yet it appears from the complaint (R., p. 15), the order of the two City Magistrates (R., pp. 16-17), and the affidavit of Henry M. Carpenter with the exhibits annexed thereto (R., pp. 21-27), which was nowhere contradicted by the appellee, that

> "*neither the defendant herein nor Raffaele De Stefano were made parties to the proceedings* in the Magistrate's Court, referred to in the complaint herein, *or had notice thereof, either constructively or otherwise, or appeared therein.* That *no process* or other notice of any kind whatsoever in the said proceedings in the Magistrate's Court or in this Court in this action *were served upon the defendant or the said Raffaele De Stefano other than the complaint* herein and copy of warrant which were served upon the defendant herein" (R., p. 23).

POINT B.

The Fourteenth Amendment to the United States Constitution affords protection to all sorts and kinds of property rights and includes choses in action such as a bank depositor's right to the payment to him of the moneys due him by the bank, and also protects the right of the bank to pay its debt to its depositor rather than to a stranger.

This proposition is fully sustained by the following authorities.

In *Chicago, Rock Island & Pacific Railway* v. *Sturm*, 174 U. S. 710, at page 716, it is said:

> *"A debt may be as valuable as tangible things.* It is not capable of manual seizure, as they are, but *no more than they can it be appropriated by attachment without process* and the power to execute the process. *A notice to the debtor must be given,* and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by the insistence upon fictions or refinements about *situs* or the rights of the creditor."

In the more recent case of *Pennington* v. *Fourth National Bank of Cincinnati*, 243 U. S. 269, Mr. Justice Brandeis, in writing for this Court, said with regard to an order made with regard to a bank deposit in a matrimonial action, where the bank, under order of the Court, had made payment to the wife and the husband appealed

because no notice had been given him of the proceeding, at page 271:

> "The 14th Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. *That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a non-resident—of which bank deposits are an example—is property within the state. Chicago, R. I. & P. R. Co.* v. *Sturm,* 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797. It is, indeed, the species of property which courts of the several states have most frequently applied in satisfaction of the obligations of absent debtors. *Harris* v. *Balk,* 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084. Substituted service on a non-resident by publication furnishes no legal basis for a judgment *in personam. Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. ed. 565. But garnishment or foreign attachment is a proceeding *quasi in rem. Freeman* v. *Alderson,* 119 U. S. 185, 187, 30 L. ed. 372, 373, 7 Sup. Ct. Rep. 165. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power."
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>
> *"The only essentials* to the exercise of the state's power are presence of the *res* within its borders, its seizure at the commencement of proceedings, and the *opportunity of the owner to be heard.* Where these essentials exist a decree for alimony against an absent defendant will be valid under the same circumstances and to the same

extent as if the judgment were on a debt; that is, it will be valid not *in personam*, but as a charge to be satisfied out of the property seized."

This case is, we submit, decisive of the case at bar. The principle involved is the same as in the case at bar. There a bank deposit was seized to pay alimony, while in the case at bar a bank account was seized to support a wife and child. In that case notice was essential, just as in the case at bar.

In *Davidson* v. *New Orleans*, 96 U. S. 97, at 102, it is said:

> *"But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no state shall deprive any person of life, liberty or property without due process of law', can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."*

In *People ex rel. Simpson* v. *Kempner*, 154 App. Div. (N. Y.) 674, at 678, it is said:

> *"Nor do we think that a process which takes from the relator the custody of the articles pledged*

and delivers them to some one claiming against the validity of the pledge, thus leaving the apparent pledgee to exercise his remedies at law against the person to whom the articles are delivered, does not constitute a taking of property."

POINT C.

A statute which takes a person's property and turns it over to another, no matter under what guise it may be done, is in the absence of a provision requiring notice to the owner of the property, unconstitutional as violative of the Fourteenth Amendment to the United States Constitution, and this is so even where notice is in fact given as a matter of grace.

The provisions of the Federal Constitution protecting persons from unjust and unlawful seizure have ever been zealously guarded by the courts and in instances too numerous to mention the courts have uniformly condemned and annulled statutes which deprive persons of their property without due process of law and have held that an essential ingredient of due process of law is notice and an opportunity to appear and be heard.

Under the sections of the Code of Criminal Procedure under which the Commissioner of Public Welfare sought to act, *it is not contemplated that the court to which the return is made will give any notice, nor is it required to give such notice.* It matters not since the statute contains no provision for notice, whether the County Court or any other court, in any manner, at any time,

might give notice. As was stated in *Security Trust Co.* v. *Lexington,* 203 U. S. 323, at page 333, by this Court:

> "If the statute did not provide for a notice in any form, it is not material that *as a matter of grace or favor* notice may have been given of the proposed assessment. *It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is required by the statute.*"

In *Stuart* v. *Palmer,* 74 N. Y. 183, at page 188, it is said, the constitutionality of the statute is to be determined "not by what has been done under it, but by what may by its authority be done" * * * "It is not enough that the owners may by chance have notice or that they may as a matter of favor have a hearing. The law must *require* notice to them and give them a *right* to a hearing and an opportunity to be heard."

The final word as to notice has been spoken by this Court in the case of *Windsor* v. *McVeigh,* 93 U. S. 273, which is relied upon by the Court of Appeals for the proposition that mere seizure constitutes sufficient notice, and which it will be seen does not sustain that contention, but the direct opposite. *Windsor* v. *McVeigh* was an action of ejectment to recover certain real property in the City of Alexandria, in the State of Virginia, brought under an Act of Congress to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels and for other purposes. Surely it cannot be contended that the offense of abandoning a wife and children, as heinous and unpardonable as it may be, can constitute a greater offense than trea-

son and rebellion, yet, in the case last cited, the Court at page 276 states the question for determination to be "whether the decree of condemnation thus rendered, without allowing the owner of the property to appear in response to the monition, interpose his claim for the property, and answer the libel, was of any validity. In other words, the question is, whether the property of the plaintiff could be forfeited by the sentence of the Court in a judicial proceeding in which he was not allowed to appear and make answer to the charges against him, upon the allegation of which the forfeiture was demanded". Here is the United States of America, a sovereign power, seeking to proceed under an act providing for the punishment of treason, than which there can be no greater offense against the Government and against the citizens at large, and yet the Court *because of the denial to the party interested of the right to be heard* speaks in severest and most profound language condemning the order which the Court below had made, and at page 277 states:

> "'*The order in effect denied the respondent a hearing.* It is alleged he was in the position of an alien enemy, and could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. *It would be contrary to the first principles of the social compact and of the right administration of justice.*'
>
> The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. *Wherever one is assailed in his person or his property, there he may defend,* for

the liability and the right are inseparable. *This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a Court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.*

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the Court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence. * * *

The position of the defendant's counsel is, that, as the proceeding for the confiscation of the prop-

erty was one *in rem*, the Court, by seizure of the property acquired jurisdiction to determine its liability to forfeiture, and consequently had a right to decide all questions subsequently arising in the progress of the cause, and its decree, however erroneous, cannot, therefore, be collaterally assailed. In supposed support of this position, opinions of this Court in several cases are cited, where similar language is used respecting the power of a court to pass upon questions arising after jurisdiction has attached. But the preliminary proposition of the counsel is not correct. *The jurisdiction acquired by the Court by seizure of the res was not to condemn the property without further proceedings.* The physical seizure did not of itself establish the allegations of the libel, and could not, therefore, authorize the immediate forfeiture of the property seized. *A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture but a mere arbitrary edict of the judicial officer.* The seizure in a suit *in rem* only brings the property seized within the custody of the Court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by its agent, and that its seizure will, therefore, operate to impart notice to him. When notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed before the Court can proceed beyond the seizure to judgment. *The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has*

been afforded to its owner and parties interested to appear and be heard upon the charges. *To this end some notification of the proceeding, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential.* Such notification is usually given by monition, public proclamation, or publication in some other form. *The manner of the notification is immaterial, but the notification itself is indispensable."*

In *Twining* v. *New Jersey,* 211 U. S. 78, this Court, at page 110, says:

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction. *Pennoyer* v. *Neff,* 95 U. S. 714, 733; *Scott* v. *McNeal,* 154 U. S. 34; *Old Wayne Life Association* v. *McDonough,* 204 U. S. 8, and that *there shall be notice and opportunity for hearing given the parties. Hovey* v. *Elliott,* 167 U. S. 409; *Roller* v. *Holly,* 176 U. S. 398; and see *Londoner* v. *Denver,* 210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this Court has", etc.

"The cases proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made *with notice to the parties affected and opportunity to be heard,* then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. Thus it was said in

Iowa Central v. *Iowa*, 160 U. S. 393, 'But it is clear that the Fourteenth Amendment in no way undertakes to control the power of the State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted gives *reasonable notice and affords fair opportunity to be heard* before the issues are decided', and in *Louisville & Nashville Railroad Company* v. *Schmidt*, 177 U. S. 230, 236: 'It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, *provided* in the proceedings which are claimed not to have been due process of law, *the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend.*' And in *Rogers* v. *Peck*, 199 U. S. 435: 'Due process of law, guaranteed by the Fourteenth Amendment, does not require the State to adopt a particular form of procedure, *so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution.*'"

Of similar purport is the case of *Roller* v. *Holly*, 176 U. S. 398, where the Court, at page 409, says:

> *"That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight;* but upon the question of the length of such notice there is a singular dearth of judicial decision."

There are so many similar decisions of the Federal and State courts that further citation of authority for the principles involved could serve no purpose.

From the foregoing citations it is apparent that the seizure of the depositor's cause of action against the bank and the recovery of judgment for the balance of his account, carrying with it the title and right of disposition of the property, all without notice, *and not incidental to an action or proceeding in which some notice is to be given,* cannot constitute notice so as to satisfy the requirements of due process of law.

It is also stated in *Ochoa* v. *Hernandez,* 230 U. S. 139, at page 161, as follows:

> *"Without the guaranty of 'due process'* the right of *private property cannot be said to exist,* in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that charter (Coke, 2 Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. *Whatever else may be uncertain about the definition of the term* 'due-process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, *and without notice or an opportunity for a hearing."*

In *Wuchter* v. *Pizzutti,* 276 U. S. 13, this Court at page 15 states:

> "This case involves the validity, under the Fourteenth Amendment, of a statute of New Jersey providing for service of process on non-resi-

dents of the State in suits for injury by the negligent operation of automobiles on its highways."

* * * * * * * *

"Although the statute did not require it, notice of its proposed execution *was actually served personally* on Wuchter in Pennsylvania. Wuchter did not appear. A final judgment was entered. Wuchter then appealed to the court below, contending that the Act under which the process was served upon him was unconstitutional, because it deprived him of his property without due process of law, in contravention of section 1 of the Fourteenth Amendment to the Federal Constitution."

* * * * * * * *

"The question made in the present case is whether a statute, making the Secretary of State the person to receive the process, must, in order to be valid, contain a provision *making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued. Section 232 of the Laws of 1924 makes no such requirement and we have not been shown any provision in any applicable law of the State of New Jersey requiring such communication.* We think that a law with the effect of this one should make a reasonable provision for such probable communication. We quite agree, and, indeed, have so held in the *Pawloski* case, that the act of a non-resident in using the highways of another state may properly be declared to be an agreement to accept service of summons in a suit growing out of the use of the highways by the owner of the automobile, but *the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to*

mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice. Otherwise, where the service of summons is limited to a service on the Secretary of State or some officer of the state, *without more, it will be entirely possible for a person injured to sue any non-resident he chooses, and through service upon the state official obtain a default judgment against a non-resident who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state has never injured anybody. A provision of law for service that leaves open such a clear opportunity for the commission of fraud* (*Heinemann* v. *Pier*, 110 Wis. 185) *or injustice is not a reasonable provision, and in the case supposed would certainly be depriving a defendant of his property without due process of law.*"

At pages 24-25 of the *Wuchter* case this Court quoted from *McDonald* v. *Mabee*, 243 U. S. 90-91, and said:

"The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. * * * No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind. Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice. * * * And in states bound together by a Constitution and subject to

the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." See also *Roller* v. *Holly,* 176 U. S. 398.

"These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here.

"But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and *such notice was not required by the statute.* Not having been directed by the statute it can not, therefore, supply constitutional validity to the statute or to service under it. *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 424, 425; *Louisville and Nashville R. R. Co.* v. *Stock Yards Company,* 212 U. S. 132, 144; *Central of Georgia Ry. Co.* v. *Wright,* 207 U. S. 127, 138; *Security Trust Co.* v. *Lexington,* 203 U. S. 323, 333; *Roller* v. *Holly,* 176 U. S. 398, 409; *Stuart* v. *Palmer,* 74 N. Y. 183, 188; *Berryhill* v. *Sepp,* 106 Minn. 458."

The syllabus in the case of *Kaukauna Co.* v. *Green Bay,* 142 U. S. 254, well sums up the decision in that case in the following language:

"Proceedings under a state statute enacted before the adoption of the Fourteenth Amendment, which, if taken before its adoption, would not have violated the Constitution, may, when taken after its adoption, violate it, if prohibited by the amendment."

POINT D.

The statute in question, purporting to assign to the Commissioner of Public Welfare the debt due the depositor, on an *ex parte* showing, without any notice whatsoever of the proceeding to the depositor, is violative of the Fourteenth Amendment to the United States Constitution.

The bank owes a debt to its depositor and was and is entirely willing to pay that debt. The statute, however, says it must pay an equivalent sum to the Commissioner of Public Welfare. This would clearly be unconstitutional, as the taking of one person's property for the benefit of another. The statute, therefore, attempts to go further and, as interpreted by the Court of Appeals, purports to create a statutory assignment of the debt. Yet that Court says that though the money may be paid over on that theory and used up, the depositor, because he has had no notice, may come in and under certain circumstances upset the proceeding and so recover from the bank. The mere statement of this proposition should be its own answer. Since the absence of notice makes the proceeding not binding on the depositor, under what theory can it be binding on the bank and justify the taking of the bank's property, which owes no duty to the alleged unfortunate wife or child and is a helpless, innocent party in the matter? Yet that is what the statute says and will do if not prevented by this Court. We respectfully submit that under the authorities herein cited this injustice should not and will not be tolerated. Of course a different question would be presented after notice, for in that case the proceeding would

be binding on the depositor and the bank could safely make the payment.

POINT E.

There is no similarity as counsel for respondent has heretofore claimed between the statute in question and warrants of attachment or sequestration proceedings in matrimonial actions, where notice following the seizure is provided for.

In actions in which warrants of attachment may be issued and in sequestration proceedings such preliminary and supplemental proceedings are merely proceedings incidental to the *main action* in which it is not only contemplated but always required that *notice be given* to the defendant. See *Pennington* v. *Fourth National Bank, supra,* Point B. It was for this reason that the Court of Appeals of New York, in *Matthews* v. *Matthews,* 240 N. Y. 28, was able to find Section 1171-a of the Civil Practice Act constitutional. In the latter case (at p. 32), it was expressly stated.

> "What the Legislature evidently intended to provide for was the case where a husband had property within the State and was concealing himself or else had disappeared so that personal service could not be made upon him. Under such circumstances, the Court, in the interest of his wife and children and the public generally, was authorized to seize his property without notice and hold it for legal disposition. By Article 54 of the Civil Practice Act, attachment was not provided for in matrimonial actions. This Sec-

> tion 1171-a attempted to provide a remedy in the nature of an attachment whereby *upon the commencement of an action* the husband's property could be seized and held for judgment or for orders *after notice.*"

The seizure was incidental to a definite cause of action by one person against another, a matrimonial action in which a summons *must* issue and be served upon the defendant to sustain the attachment.

In the case of *Matthews* v. *Matthews,* just referred to, it is further specifically stated (at p. 33), that the order for sequestration

> "* * * is the only step which by this section the Court is authorized to take without notice. This section recognizes and must be read in connection with the other provisions of the act which provide that where the defendant is a non-resident or conceals himself so that he cannot be found within the State, service may be made upon him by publication (Civ. Prac. Act, Sec. 232, subd. 5). In that case an order of sequestration may be made *but the service of the summons by publication must be commenced at once or within a reasonable time.*"

The Court further stated (at p. 34):

> "*It must be conceded that no judgment could be obtained for the disposition of the sequestered property without personal or constructive service upon the defendant.* We have no such thing in our practice; in fact there is no such thing in existence in the law as a personal judgment without service or notice of some kind, and the only

kind of notice that we recognize in this State for the obtaining of a judgment is personal service, substituted service or the service by publication *of the summons in the action.*"

We submit that the judgment in the instant case purports to transfer to plaintiff as his own in his official capacity the balance owing by the bank to its customer.

POINT F.

The mere so-called seizure of the debt due the alleged absconder was not sufficient notice to satisfy the constitutional requirement of due notice.

As pointed out above, the Court of Appeals sought to uphold the statute if notice was necessary, which it denied, by asserting that if notice was necessary it would be found in the seizure.

We submit that the cases of *Miller* v. *Lautenberg*, 239 N. Y. 142, cited by the Court of Appeals, or *Pennoyer* v. *Neff*, 95 U. S. 714, heretofore relied upon by counsel for the respondent, are not applicable to the case at bar. It is true that the Court in *Miller* v. *Lautenberg* said that seizure was notice, but it is vital to bear in mind, first, that the Court there was passing upon a war-time act, and further than that and what is of more vital importance, the distinction between the Trading-With-the-Enemy Act and Sections 921 and 925 of the Code of Criminal Procedure must be borne in mind. The Trading-With-the-Enemy Act is an act merely to put the Government in possession of property of alien enemies or of persons claimed to be alien enemies, but does not in any-

wise provide for the distribution of the proceeds thereof. This is left to future action. The Trading-With-the-Enemy Act is to this extent incomplete. The property is retained by the Alien Property Custodian as Trustee. The sections of the Code of Criminal Procedure, however, are complete in and of themselves, and by their terms not only provide for the seizure of property and the vesting of title in the officers named, but provide for its distribution immediately following such procedure and without notice of any kind whatsoever. Had the Trading-With-the-Enemy Act provided that the property by mere seizure and without notice of further proceedings, was forfeited, we do not believe that the Court would have held, as it did in the case of *Miller* v. *Lautenberg*. The Act would have then come within the condemnation of the case of *Windsor* v. *McVeigh, supra*, where, under an Act of Congress to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels and for other purposes, the forfeiture of property seized without notice was sought to be upheld, and it was there stated at page 277 that there must be notice to a party of some kind, actual or constructive, "beyond that arising from the seizure", to a valid judgment affecting his rights, and that, until notice is given, the Court had no jurisdiction in any case to proceed to judgment, whatever its authority might be by the law of its organization over the subject-matter, and it was further stated at page 278 that

> "the position of defendant's counsel is, that as the proceeding for the confiscation of the property was one *in rem*, the Court by seizure of the property acquired jurisdiction to determine its liability to forfeiture, and consequently had a right

to decide all questions subsequently arising in the progress of the cause; and its decree, however erroneous, cannot therefore be collaterally assailed. In supposed support of this position, opinions of this Court in several cases are cited, where similar language is used respecting the power of a court to pass upon questions arising after jurisdiction has attached. But the preliminary proposition of the counsel is not correct. The jurisdiction acquired by the court by seizure of the *res* was not to condemn the property *without further proceedings*. The physical seizure did not of itself establish the allegations of the libel and could not therefore authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer."

While it is true that the Court, in *Windsor* v. *McVeigh*, states that the theory of the law is that all property is in the possession of its owner in person or by agent, and that its seizure will therefore operate to impart notice to him, yet this Court, in that case, was very careful to add, at page 279, that:

"The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded by its owners and parties interested to appear and be heard upon the charges. *To this end, some notification of the proceedings, beyond that arising from the seizure prescribing the time within which the appearance must be made, is essential. Such notice is usually given by monition, public proclamation, or publication*

in some other form. The manner of the notification is immaterial, but the notification itself is indispensable."

The case last cited establishes the unsoundness of the argument of the Court of Appeals that seizure of the deposit at the instance of a public officer was warning to the depositor that a proceeding had been begun, and the statute "told him, a resident of the state" (there is no proof of De Stefano's residence) "that a hearing would come on at the next term of the County Court", which terms are publicly appointed. Such implied notice could be nothing more than a fraud, first because the term of court might come on the next day and moreover the constructive notice by seizure not only could not and would not actually apprise the person whose property was seized of the time of hearing because the hearing is not set for the opening of the term but merely for the "next term of court", and assuming that he ascertained when the next term of court was to be held at which the hearing would be had, an effort to protect himself would require constant attendance (the proceeding being *ex parte*), that he might be at hand at the time the authorities, choosing at random of their own will, when they would seek a hearing and ask a confirmation of their earlier proceedings, happened to appear. And all of this might be of no avail when the proceeding actually came on, for the reason that he might not be granted a hearing at all since the statute nowhere gives him a *right* to be heard as a matter of law, and not of favor.

Moreover, in the case of *Security Savings Bank* v. *California*, 263 U. S. 282, cited in the case of *Miller* v. *Lautenberg* (*supra*), the statute there apparently pro-

vided (Code of Civil Procedure, Section 1272) for personal service on the bank and publication of the summons in a newspaper before the State might take over from the bank deposits which had not been claimed for more than twenty years, and the Court at page 287, stated:

> "These are generally considered proceedings strictly *in rem*. But whether the proceeding should be described as being *in rem* or *quasi in rem* is not of legal significance in this connection. In either case the essentials of jurisdiction over deposits are that there be seizure of the *res* at the commencement of the suit and *reasonable notice and opportunity to be heard*. Compare *Pennoyer* v. *Neff*, 95 U. S. 714, 724; * * *"

The case of *Pennoyer* v. *Neff*, 95 U. S. page 714, cited in the case of *Miller* v. *Lautenberg* (*supra*), supports the contention in the case of *Security Savings Bank* v. *California* (*supra*), and is not an authority for the proposition that mere seizure of property supplies sufficient notice. The Court in *Pennoyer* v. *Neff*, at page 727, says that

> "*substituted service by publication, or in any other authorized form*, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. * * * In other words, such service may answer in all actions which are substantially proceedings *in rem*."

In the case of *Ackerman* v. *Ackerman*, 55 N. J. L. 422 (27 Atl. 807), which concerned a statute for the relief of poor relatives, quite similar to the statute under con-

sideration in the case at bar, which New Jersey statute the Court states

> "may be traced back in our legislation to Section 17 of the 'Act for the Settlement and Relief of the Poor', passed March 11, 1774, which section re-enacted with some modifications the Act of 43 Elizabeth, Chapter 2, Section 7."

The Court further states:

> *"'Without doubt, the relative against whom the order is applied for, must have reasonable notice and an opportunity to be heard.'"*

In the case of *Faling* v. *Multnomah County*, 46 Ore. 460 (80 Pac. 1009), which is a proceeding of similar nature, the Court, at page 464, states:

> "The Court could not very well direct the relative to discharge the duty thus enjoined upon him *without according him a hearing*, and for such purpose it would not be improper to cite the alleged delinquent to appear before it to show cause why the direction should not be made."

POINT G.

The statute in question cannot be supported as a regulation under the police power, where notice may be dispensed with in certain cases as fire and flood where the maxim *salus rei-publicae suprema lex* applies.

We respectfully submit that the statute may not be regarded as a regulation for the exercise of the police power of the State or as one dealing with an emergency as critical as fire, epidemic, flood, or similar emergencies, where the maxim, *salus rei-publicae suprema lex* applies. Where an emergency, such as fire, flood, or epidemic confronts the people, there is nothing for the State to do but to meet it by such means as are sufficient to overcome it, whether this means affects or destroys private property or otherwise. The perils and necessities of such emergencies cannot be applied to persons about to become a charge upon the State. If the persons about to become a public charge upon the State were about to become such, not by reason of the absconding of a parent, but because of the death of the parent or his incapacitation, the danger would be just the same and the State would be required to support them. In cases of emergency, such as floods, fires or epidemics, the need for immediate action is imperative. In no other manner may they be met. Such immediate action is in nowise necessary to procure the support of dependent persons. If the State be required to support them temporarily, nothing calamitous will happen to the State or to the individuals concerned if property of persons responsible for the support of dependents is seized, held by the State, and upon

notice to the person claimed to be charged with the support of the dependents, the property sold or disbursed, and the State reimbursed for such expenditures as it has already made, and the balance by order of the Court, after such notice, disbursed for the support of the dependents.

POINT H.

The antiquity of the statute is of no importance except in cases of ambiguity, when it may be considered in determining the proper construction of the statute. Where the language of the statute is clear and precise and the meaning evident the statute will be declared unconstitutional no matter how long it has been in existence.

This statement is abundantly supported by the following authorities:

In the case of *Fairbank* v. *United States,* 181 United States Reports, 283 at page 310, this Court, holding a tax law to be unconstitutional, although similar laws had been passed by Congress repeatedly since the earliest times and had been enforced by government officials during that time, said:

> "Thus, in *Swift Company* v. *United States,* 105 U. S. 691, 695, Mr. Justice Matthews said:
>
> 'The rule which gives determining weight to contemporaneous construction, put upon a statute, by those charged with its execution, *applies only in cases of ambiguity and doubt.*'

In *United States* v. *Graham*, 110 U. S. 219, 221, Chief Justice Waite thus stated the law:

'Such being the case it matters not what the practice of the departments may have been or how long continued, for *it can only be resorted to in aid of interpretation*, and "it is not allowable to interpret what has no need of interpretation". If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. *But with language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid.* The cases to this effect are numerous.'

In *United States* v. *Tanner*, 147 U. S. 661, 663, it was said by Mr. Justice Brown:

'If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but, as it is clear to us that this construction was erroneous, we think it is not too late to overrule it. *United States* v. *Graham*, 110 U. S. 219; *Swift Company* v. *United States*, 105 U. S. 691. It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material.'

and continued at page 312:

'But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution.' "

Willoughby on the Constitution of the United States, Vol. 1, Second Edition, notes to page 51, quotes the following language from Story's *Commentaries*:

> "Contemporary construction", says Story, in his *Commentaries*, "is properly resorted to, to illustrate, and confirm the text, to explain a doubtful phrase, or to expound an obscure clause; and in proportion to the uniformity and universality of that construction, and the known ability and talents of those, by whom it was given, is the credit to which it is entitled. It can never abrogate the text; it can never fritter away the obvious sense; it can never narrow down its true limitations, it can never enlarge its natural boundaries."

In the case at bar the language of the statute is absolutely clear and precise, and the meaning of the statute is perfectly evident. Under such circumstances its unconstitutionality should be declared even though the statute is an ancient one.

POINT I.

The appellant bank has the right to raise the question of the constitutionality of the act and thereby protect its own property rights.

As to the suggestion as to the right of the bank to raise the question of the unconstitutionality of the entire enactment, since the entire enactment affects a direct right of the bank, there can be no doubt as to its interest in the statute and in the litigation under it, and it would follow that if it has any interest in the statute and the litigation thereunder, it would have a right to question the constitutionality.

The defendant bank has no property belonging to the husband, the relation between a bank and a depositor therein being merely that of debtor and creditor, which is established by a long list of cases, among others the following:

Erb v. *Banco di Napoli*, 243 N. Y. 45 (49);
Aetna National Bank v. *Fourth National Bank*, 46 N. Y. 62;
Shipman et al. v. *Bank, State of New York*, 126 N. Y. 318;
General Fire Assurance Co. v. *State Bank*, 177 App. Div. (N. Y.) 745.

All the husband, the depositor, had was an intangible thing, *i. e.*, a cause of action against the bank for the debt if it refused to pay upon demand.

A bank has title to a deposit and can be called upon only to return the equivalent amount to its depositor. The business of a bank is to receive deposits, and out of these deposits to loan money upon which it receives interest. It has a right to retain the deposit and to make loans thereon until called upon by the depositor for the payment of an equivalent sum. If the statute takes away this deposit, the right and interest of the bank is necessarily affected, especially as the Court of Appeals admits it might have to pay the depositor even after it had made payment to the Commissioner of Public Welfare. The interests of the plaintiff in the action of *Roberts & Schaefer Co.* v. *Emerson*, 271 U. S. page 250, cited by the Court of Appeals, are not at all analogous to the interest of the bank in the present instance. At page 54 of that case it is stated:

> "But the plaintiff is not in a position to raise this question. As this Court has often held, one

> who challenges the validity of said taxation on the ground that it violates the equal protection clause, cannot rely on theoretical inequalities or such as do not affect him, but *must show that he is himself affected unfavorably* by the discrimination of which he complains."

This the appellant has shown.

But the controlling precedent is that of *Pierce* v. *Society of Sisters*, 268 U. S. 510, where it was held by this Court that an Act of the State of Oregon compelling all children to attend public schools was unconstitutional upon the ground that the liberty of the children's parents in choosing the child's school was unwarrantably interfered with. The plaintiffs in that case, however, were not parents but corporations conducting private schools, and it was held that as property rights of the schools were affected by such legislation the schools had sufficient interest to maintain the action and question the constitutionality of the statute. In other words the constitutional rights invaded were those of others, but by that invasion the plaintiffs' property was affected, which gave them a standing before this Court.

A fortiori, in the instant case the appellant is more clearly entitled to question the constitutionality of the statutes in question here not only because the respondent cannot state a cause of action unless the statutes are constitutional, but further because the appellant has a clear property right which has actually been invaded and which it is seeking to protect, to wit, the principal amount of the judgment for which amount, if the statute is unconstitutional, it will be again liable in an action by the depositor after paying the judgment in this action and also interests and costs incurred in this action as

contained in the judgment herein, which action was instituted not by appellant but by appellee, and which interests and costs must be met and paid out of the property of the bank not included in the account of its depositor.

POINT J.

The judgment and order of the Court of Appeals of the State of New York, dated the 31st day of December, 1928, in this cause, should be reversed, with costs in this court, the Court of Appeals of the State of New York, the Appellate Term of the Supreme Court of the State of New York, First Department, and in the City Court of the City of New York; and the judgment of the City Court of the City of New York, first entered, bearing date October 18th, 1927, in favor of the Corn Exchange Bank, should be reinstated and affirmed, and this cause remanded to the Clerk of the City Court of the City of New York, with directions to said Clerk and the Justices of said court to take appropriate action to carry out the decree of this court.

Respectfully submitted,

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APPENDIX.

For convenient reference by the Court, Sections 921-925 of the Code of Criminal Procedure are here set forth. They are as follows:

"§921. *Parents leaving their children chargeable to the public, how proceeded against.*

(a) When the father, or the mother, absconds from the children, or a husband from his wife, or a wife from her husband, leaving any of them chargeable or likely to become chargeable upon the public, the officers mentioned in section nine hundred and fourteen may apply to any two justices of the peace or police justices in the county in which any real or personal property of the father, mother, husband or wife is situated, for a warrant to seize the same. Upon due proof of the facts, the magistrate must issue his warrant, authorizing the officers so applying to take and seize the property of the person so absconding.

(b) Whenever any child shall be committed to an institution pursuant to any provision of law, any criminal court or magistrate may issue a summons or warrant for a parent of the child or any other person required by law to maintain or support such child, and examine into his or her ability to maintain such child in whole or in part; and if satisfied that such parent or other person is able to contribute toward the support of the child, then such court or magistrate shall, by order, require the weekly payment by such parent or other person of such sum and in such manner as shall be in said order directed, toward

the maintenance of such child in such institution, which amount when paid shall be credited by the institution to the city, town or county against any sums due to it therefrom on account of the maintenance of such child. In case any city, town or county shall have paid any sums to any such institution on account of the maintenance of such child on the request in writing of the officers in charge of the administration of the poor law for such city, town or county, such criminal court or magistrate may at any time within five years after such payment issue a summons or warrant, as above, for the parent, or other persons required by law to maintain or support such child, may examine into his or her ability to maintain such child, in whole or in part, and may make an order for the repayment to such city, town or county, in whole or in part, of the sums so expended by it on account of the maintenance of such child.

§922. *Seizure of their property; transfer thereof, when void.*

The officers so applying may seize and take the property, wherever it may be found in the same county; *and are vested with all the rights and title thereto which the person absconding then had.* The sale or transfer of any personal property, left in the county, from which he absconded, made after the issuing of the warrant, whether in payment of an antecedent debt or for a new consideration, is absolutely void. The officers must immediately make an inventory of the property seized by them, and return it, together with their proceedings, to the next county court of the

county where they reside, there to be filed." (Italics ours.)

"§923. *Warrant and Seizure, when confirmed or discharged; direction of the court thereon.*

The court, upon inquiring into the circumstances of the case, may confirm or discharge the warrant and seizure; and if it be confirmed, must, from time to time, direct what part of the personal property must be sold, and how much of the proceeds of the sale, and of the rents and profits of the real property, if any, are to be applied toward the maintenance of the children or spouse of the person absconding.

§924. *Warrant, in what cases to be discharged.* If the party against whom the warrant issue, return and support the spouse or children so abandoned, or give security satisfactory to any two justices of the peace, or police justices in the city, village or town to the overseers of the poor of that town, or in the city of New York, to the commissioners of charities and corrections, that the spouse or children so abandoned shall not be chargeable to the town or county, then the warrant must be discharged by an order of the magistrates, and the property taken by virtue thereof restored to the party.

§925. *Sale of the property seized and application of its proceeds.*

The officers must sell at public auction the property ordered to be sold, and receive the rents and profits of the real property of the person absconding, and in those cities, villages or towns which are required to support their own poor, the

officers charged therewith must apply the same to the support of the wife or children so abandoned; and for that purpose must draw on the county treasurer, or in the city of New York, upon the comptroller, for the proceeds as directed by special statute. They must also account to the county court of the county, for all money so received by them, and for the application thereof, from time to time, and may be compelled by that court to render that account at any time."